APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19001

SUN OIL COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

(April 25, 1962)

Before TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges.

JONES, Circuit Judge: This is a companion case, in a way, to *Sun Oil Company* v. *Federal Power Commission*, No. 19424, —— F. 2d ——, which this Court has decided today. In both cases we are asked to pass upon the validity of orders of the Commission which amend its Regulations. In the other case the petition for review was of an order in a proceeding to which the petitioner is a party and in which reference to the Regulation was made. In this case we are asked to review the amending order itself.

By its Order No. 232 and Order No. 232-A, issued March 3, 1961, and March 31, 1961, and made effective April 3,

1961, Section 154.93 was amended by adding the following proviso:

> "Provided, that in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
>
> (2) provisions that change a price to a specific amount at a definite date; and
>
> (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

The petitioner, Sun Oil Company, filed with the Commission an application for rehearing. On May 4, 1961, the Commission advised Sun that the two orders prescribed a general rule upon which an application for rehearing does not lie, and that the application was being considered as a comment upon the orders. On the following day the application was rejected by the Commission and returned to Sun. A petition for review, filed by Sun, has brought the matter before us.

The Commission, although it filed no motion to dismiss, urges that there is a complete absence of any right of review and that this Court should, of its own motion, dismiss the petition for want of jurisdiction. The situation here is not wholly unlike that which was presented by *Magnolia Petroleum Co. v. Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 785, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. There the petitioners sought, by petitions for review, to have Order No. 174-A vacated, set aside and nullified upon the grounds, also here asserted, that the order was beyond the statutory powers of the Commission and deprived the petitioners of constitutional rights. So also, in *Magnolia* as in the case here considered, it was urged that although the order purported to be procedural in form it was actually adjudicatory by requiring and prohibiting action and depriving the petitioners of substantive rights. Order No. 232 and Order No. 232-A are not determinative of status, do not adjudge rights or obligations nor direct the taking or refraining from any particular action. With this being so, we hold as was held in *Magnolia* that the Orders and Regulation are not subject to review under the provisions of Section 19 (b) of the Natural Gas Act, 15 U.S.C.A. § 717 r (b). See also *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408; *California Oregon Power Company v. Federal Power Commission*, D. C. Cir. 1956, 239 F. 2d 426.

In the event that Sun seeks to put price increases into effect pursuant to a particular contract provision which the Regulation declares inoperative, and the Commission enters its order disallowing the increase and asserts Regulation 154.93 as the basis of its order, the validity of the order can be tested by a petition for review. Such order would be of a definitive character dealing with the merits of a proceeding before the Commission. *Federal Power Commission v. Metropolitan Edison Co., supra.* Until the Commission, in a proceeding before it, has entered an order or made a decision applying or enforcing the Regulation so

as to place in a position where it is required to do or refrain from taking some action, or is presently to be deprived of property or of a legal right, or some relationship or status is to be changed to its detriment, Sun will not be aggrieved within the meaning of the Act.

The argument is advanced by Sun that the orders constitute an unjustified and unauthorized interference with the right of contract. Cf. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, 79 S. Ct. 344, 3 L. Ed. 2d 350; *Sun Oil Company* v. *Federal Power Commission*, 5th Cir. 1959, 266 F. 2d 222, aff. 364 U. S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639. So too, Sun urges, it is for Congress, not the Commission, to correct the evils, if such they are, in the contractual rate change provisions which the Commission's orders would outlaw. It might be interesting to speculate as to whether or not it would be desirable that the Courts be given jurisdiction to pass upon the validity of administrative orders which are unrelated to a particular proceeding before the administrative body, or whether such jurisdiction, if granted, would be within the judicial power as conferred upon the Federal Courts. But since no effort has been made to confer such jurisdiction we need not indulge in seeking answers to hypothetical queries.

While this matter was pending before us the Commission, on February 8, 1962, issued its Order No. 242 which further amends its Regulation § 154.93 and other Regulations. We may take notice of its having been issued but are not called upon to comment with respect to its validity or effect.

Since we reach the conclusion that we have no jurisdiction, it follows that the petition for review must be

DISMISSED.

A true copy

Test: EDWARD W. WAIDSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

SEAL

New Orleans, Louisiana June 15, 1962

Judgment

Extract from the Minutes of April 25, 1962

No. 19001

SUN OIL COMPANY

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for review of orders of the Federal Power Commission issued March 3, 1961 and March 31, 1961 in Docket No. R-153, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review in this cause be, and the same is hereby, dismissed.

No. 19001

May 29, 1962

On Petition for Rehearing

Before TUTTLE, Chief Judge, and JONES and GEWIN, Circuit Judges

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

APPENDIX B

Excerpts from the Constitution of the United States Amendment V—Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

SEC. 4. • • •

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such

notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus

made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observe, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in ac-

cordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * * *

SEC. 7. * * *

(e)[2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judg-

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[2] Subsection 7 (e) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

ment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][3]

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[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7-(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of

(d)[4] Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(d)]

(e)[5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (c), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F.P.C. 29.

[4, 5] See footnote 2, p. 7.

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

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REHEARING; COURT REVIEW OF ORDERS

SEC. 19. * * *

(b)[9] Any party to a proceeding under this act aggrieved

[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

Excerpts from the Communications Act of 1934, as Amended

PROCEEDINGS TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ORDERS OF THE COMMISSION

SEC. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Excerpts from The Judicial Review Act

JURISDICTION

SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in

accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, * * *

* * * * * * * * * *

REVIEW OF ORDERS

SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

Excerpts from the Administrative Procedure Act

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory re-

view proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all

relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.